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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte BRUCE W. STEVENS

Appeal 2007-3710
Application 09/977,900
Technology Center 2100

Decided: March 28, 2008

Before JAMES D. THOMAS, ALLEN R. MACDONALD,
and STEPHEN C. SIU, *Administrative Patent Judges*.

THOMAS, *Administrative Patent Judge*.

DECISION ON APPEAL

This appeal involves claims 21 through 34. We have jurisdiction under 35 U.S.C. §§ 6(b) and 134(a).

As best representative of the disclosed and claimed invention, independent claim 21 is reproduced below:

21. A method for making a coordinated presentation for display on a plurality of computers utilizing a software control program, said method comprising:

installing the software control computer program on each of said plurality of computers;

installing at least two different sets of files to be played for said coordinated presentation on each of said plurality of computers, different sets of files being installed on at least two of the plurality of computers;

providing at least one scenario file on each of said plurality of computers, said at least one scenario file associating a playing time for a file of said at least one set of files on each of said plurality of computers such that an effective beginning time is associated with each file, said scenario file scheduling playing of different files on different ones of said plurality of computers in a coordinated manner;

synchronizing each computer to a common time; and

playing each file in each corresponding at least two set of files for each of said plurality of computers according to the scenario file on that computer and the synchronized time a coordinated by the software control program to result in a coordinated presentation of files on each computer of said plurality of computers.

The following references are relied on by the Examiner:

Hogie	US 5,923,307	Jul. 13, 1999
Suzuki	US 6,470,356 B1	Oct. 22, 2002 (filing date August 30, 1999)
Bookspan	US 6,636,888 B1	Oct. 21, 2003 (filing date June 15, 1999)
Liang	US 6,766,355 B2	Jul. 20, 2004 (filing October 21, 1998)

Mills, David L., "Network Time Protocol (NTP) General Overview,"
University of Delaware, August 2, 2004¹

¹ We recognize that the apparent publication date of Mills is August 2, 2004. On the other hand, as revealed at page 4 of the Final Rejection and page 6 of the Answer, the Examiner relies upon the Network

All claims on appeal stand rejected under 35 U.S.C. § 103. As evidence of obviousness as to claims 21 through 27, 30, 31, and 34, the Examiner relies upon Bookspan in view of Mills and Liang, further in view of Suzuki. In a second stated rejection, the Examiner relies upon all of these references further in view of Hogie as to claims 28, 29, 32, and 33.

Rather than repeat the positions verbatim of the Appellant and the Examiner, reference is made to the Brief (no Reply Brief has been filed) for Appellant's positions, and to the Answer for the Examiner's positions.

OPINION

For the reasons set forth by the Examiner in the Answer, as slightly amplified here, we sustain each of the two stated rejection of the claims on appeal. Both independent claims 21 and 31, to which arguments are addressed in the Brief, are included in the initial rejection. No arguments are presented to us as to the second stated rejection.

Appellants have the burden on appeal to the Board to demonstrate error in the Examiner's position. *See In re Kahn*, 441 F.3d 977, 985-86 (Fed. Cir. 2006) ("On appeal to the Board, an applicant can overcome a rejection [under § 103] by showing insufficient evidence of *prima facie* obviousness or by rebutting the *prima facie* case with evidence of secondary indicia of nonobviousness.") (quoting *In re Rouffet*, 149 F.3d 1350, 1355 (Fed. Cir. 1998)).

Time Protocol (NTP) teachings of this reference that are at pages 2 and 9 of this document that indicate that the earlier versions of this protocol have been used since 1992. The Examiner's reliance upon this data in Mills has not been contested in the Brief.

“Section 103 forbids issuance of a patent when ‘the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.’” *KSR Int’l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1734 (2007).

The Supreme Court reaffirmed principles based on its precedent that “[t]he combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.” *KSR*, 127 S. Ct. at 1739. The operative question in this “functional approach” is thus “whether the improvement is more than the predictable use of prior art elements according to their established functions.” *Id.* at 1740. The Court noted that “[c]ommon sense teaches . . . that familiar items may have obvious uses beyond their primary purposes, and in many cases a person of ordinary skill will be able to fit the teachings of multiple patents together like pieces of a puzzle.” *Id.* at 1742.

The Federal Circuit recently concluded that it would have been obvious to combine (1) a device for actuating a phonograph to play back sounds associated with a letter in a word on a puzzle piece with (2) a processor-driven device capable of playing the sound associated with a first letter of a word in a book. *Leapfrog Enters., Inc. v. Fisher-Price, Inc.*, 485 F.3d 1157, 1161 (Fed. Cir. 2007). In reaching that conclusion, the Federal Circuit recognized that “[a]n obviousness determination is not the result of a rigid formula disassociated from the consideration of the facts of a case. Indeed, the common sense of those skilled in the art demonstrates why

some combinations would have been obvious where others would not.” *Id.* at 1161 (citing *KSR*, 127 S. Ct. 1727, 1739 (2007)). The Federal Circuit relied in part on the fact that Leapfrog had presented no evidence that the inclusion of a reader in the combined device was “uniquely challenging or difficult for one of ordinary skill in the art” or “represented an unobvious step over the prior art.” *Id.* (citing *KSR*, 127 S. Ct. at 1740-41).

In the absence of separate arguments with respect to claims subject to the same rejection, those claims stand or fall with the claim for which an argument was made. *See In re Young*, 927 F.2d 588, 590 (Fed. Cir. 1991). *See also* 37 C.F.R. § 41.37(c)(1)(vii)(2004).

Dovetailing with this precedent, we note further that the test for obviousness has been further characterized as not whether the features of a secondary reference may be bodily incorporated into the structure of a primary reference. It is also not that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art. *In re Keller*, 642 F.2d 414, 425 (CCPA 1981); *In re Young*, 927 F.2d 588, 591 (Fed. Cir. 1991).

At the outset, we note that Appellant’s statements at pages 3 and 4 of the Brief relating to the issues presented for review misstates the actual rejections of the claims on appeal. The manner in which Appellant states the rejections as topics I and II at pages 3 and 4 of the Brief that are further developed later in the Brief appears to indicate that claims 21 through 34 are rejected over Suzuki in one stated rejection along with other prior art and a separately stated rejection of the same claims 21 through 34 relying upon

Liang along with other additional prior art. The arguments in the Brief wrongly appear to indicate that separately stated rejections, one of which relies upon Suzuki and the other which relies upon Liang, are before us as if there were separately stated rejections. As we noted earlier, the first stated rejection relies upon both references among others. Thus, we are in agreement with the Examiner's observation at page 13 of the Brief which we reproduce here:

As an initial matter, the examiner would like to draw the Board's attention to the fact that Appellant has not argued the rejection as set forth by the examiner. Rather, Appellant has addressed the references individually and argued that they don't have elements which they were not relied upon to show.

As to the merits of the positions set forth in the Brief directed to Suzuki and Liang, we agree with the Examiner's responsive arguments as to these references beginning at page 13 of the Answer where the Examiner points out that in some instances a respective reference was not relied upon to teach limitations that appeared to be argued, whereas an unargued reference was utilized in the rejection for the argued feature. Additionally, the Examiner addresses Appellant's arguments made under topic II that the artisan could not have combined Liang with the other applied prior art; these arguments are addressed beginning at the bottom of page 14 of the Answer. The Examiner's positions in the statements of the rejections portion of the Answer as well as these responsive arguments appear to be consistent with the rationales required by the earlier-noted case law. Thus, based on the weight of the arguments and evidence before us and because no Reply Brief

has been filed to contest the Examiner's additional observations according to the responsive arguments portion of the Answer, we sustain the rejections before us.

In conclusion, since Appellant has not pointed out to us any error in the Examiner's formulation and reliance upon the applied prior art in the two separate rejections of the claims on appeal under 35 U.S.C. § 103, the decision of the Examiner is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. §1.136(a). See 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

pgc

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